

FILE COPY

Office - Supreme Court, U. S.

FILED

JUL 15 1942

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 234

G. F. ALBIN,

Petitioner,

vs.

**COWING PRESSURE RELIEVING JOINT COMPANY,
AN UNINCORPORATED COMPANY, ETC., ET AL.**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

✓
LEWIS E. PENNISH,
Counsel for Petitioner.

THOMAS S. McCABE,
Of Counsel.

INDEX.

SUBJECT INDEX.

	Page
Petition for writ of certiorari.....	1
Summary statement of matter involved.....	1
Statement of basis of this Court's jurisdiction.....	4
Questions presented.....	4
Reasons for the allowance of the writ.....	5
Prayer for writ.....	7
Brief in support of petition.....	9
Opinions below.....	9
Jurisdiction.....	9
Statement of the case and questions presented.....	9
Specification of errors.....	9
Argument.....	10
I. The several Circuit Courts of Appeals have jurisdiction of all appeals from orders, interlocutory or final, entered in the bankruptcy court.....	10
II. The order entered March 26, 1942 in the trial court, vacating the restraining order, is an appealable order.....	12
III. It is mandatory that state court actions be stayed pending adjudication in bankruptcy under Section 11 of the Bankruptcy Act.....	20

TABLE OF CASES CITED.

<i>Enelow v. New York Life Ins. Co.</i> , 293 U. S. 379.....	12
<i>Field v. Kansas City Refining Co.</i> , 296 Fed. 800.....	15
<i>General Electric Co. v. Marvel Metals Co.</i> , 287 U. S. 430.	13
<i>Gerstenzang, In re</i> , 52 F. (2d) 863.....	21
<i>Griese v. Mutual Life Ins. Co.</i> , 165 Fed. 48.....	16
<i>Locker, In re</i> , 30 Fed. Supp. 642.....	22
<i>Manufacturer's Finance Corp. v. Vye-Neill Co.</i> , 46 F. (2d) 146.....	22
<i>McGonigle v. Foutch</i> , 51 F. (2d) 455.....	18

	Page
<i>Orgill Bros. v. Coleman</i> , 146 Miss. 217, 111 So. 201, . . .	23
<i>Seattle Curb Exchange v. Knight</i> , 46 F. (2d) 34.	19
<i>Shanferoke Coal & Supply Corp. v. Westchester Service Corp.</i> , 293 U. S. 449.	13
<i>Star Braiding Co. v. Stienen Dyeing Co.</i> , 44 R. I. 8, 114 Atl. 129.	22
<i>Vadner, In re</i> , 259 Fed. 614.	21
<i>Western Union Telegraph Co. v. U. S. & M. T. Co.</i> , 221 Fed. 545.	16

STATUTES CITED.

Bankruptcy Act of 1938, Chapter III, Section 11.	3, 4, 5, 20, 24
Bankruptcy Act of 1938, Chapter IV, Section 24.	11, 12
Judicial Code, Sec. 129.	6, 10, 12, 13, 15, 18, 19
Judicial Code, Sec. 240.	9

TEXT CITED.

Remington on Bankruptcy, Vol. 8, Section 3769.	12
--	----

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 234

**In the Matter of COWING PRESSURE RELIEVING
JOINT COMPANY, AN UNINCORPORATED COMPANY OR
ASSOCIATION, AN ALLEGED BANKRUPT.**

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Summary Statement of Matter Involved.

Your petitioner, G. F. Albin, praying for a Writ of Certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit dismissing an appeal "for lack of jurisdiction" from the District Court of the United States for the Northern District of Illinois, Eastern Division, respectfully submits:

This is a bankruptcy case. G. F. Albin, the petitioner herein, on February 9, 1942, filed his petition for involuntary adjudication of the respondent, Cowing Pressure Relieving Joint Company, an unincorporated company or association, an alleged bankrupt, containing the usual allegations (R. 1-3). On February 21, 1942, your petitioner

filed in said bankruptcy proceedings a petition for a restraining order, alleging that there were certain proceedings pending in the state courts of Illinois in one of which a counterclaim was pending against the alleged bankrupt in a sum in excess of \$1,000 over all claims of the alleged bankrupt against the creditor, and in the other of which the creditor of the alleged bankrupt was suing for the sum of approximately \$2,500 (R. 7-9). Your petitioner prayed *inter alia* that an order be entered restraining and enjoining the alleged bankrupt and said creditors from in any way prosecuting any and all suits, at law or in equity, against the alleged bankrupt until further order of court (R. 9). The petitioner further showed that unless said litigation in the state court was restrained and enjoined the assets of the alleged bankrupt might be dissipated and wholly lost to the estate, causing irretrievable damage to all the creditors including your petitioner (R. 8). On the same date upon which said petition was filed the Honorable Michael L. Igoe, one of the judges of said District Court, entered a restraining order restraining further prosecution of said two suits in the state courts of Illinois (R. 9-10).

On March 20, 1942, the alleged bankrupt filed an answer denying the allegations of the petition for involuntary adjudication in bankruptcy (R. 3-7). On the same date the alleged bankrupt also filed a petition to dissolve the restraining order, alleging that numerous hearings had been had in the first of the state court cases and that said proceeding was pending before the Master in Chancery to whom it had been referred; that said restraining order was obtained with notice to the first creditor but without notice to the alleged bankrupt; that "the sole purpose" for which bankruptcy proceeding was instituted was to defeat a claim of the alleged bankrupt against the first creditor; and that "notwithstanding the motive

for the institution of this proceeding, it is to the best interests of the bankrupt estate" that the first state court proceeding continue before the Master in Chancery (R. 10-13).

Your petitioner thereupon filed a motion to dismiss the petition to vacate the restraining order, showing that in accordance with Chapter III, Section 11 of the Bankruptcy Act as amended in 1938 (usually called the Chandler Act), it was *mandatory* that all suits against an alleged bankrupt pending at the time of the filing of the bankruptcy petition be stayed until the debtor's adjudication or until dismissal of the bankruptcy petition (R. 13-14). Your petitioner further showed that the first of the two claims against the alleged bankrupt was a claim dischargeable in bankruptcy; that an answer had been filed to the involuntary petition for adjudication placing this cause at issue; and that your petitioner, as petitioning creditor, was ready, willing and able forthwith to proceed before the court or referee to try the issues raised by the bankruptcy petition (R. 14).

The petition of the alleged bankrupt to vacate the restraining order came on for formal hearing before the bankruptcy court, the Honorable John P. Barnes, Judge presiding, on March 26, 1942. As recited by the order entered on that date, the trial court examined the petition and was "fully advised as to the facts," although no evidence to support the petition to vacate was offered by the alleged bankrupt (R. 15). There is no foundation in the record for the alleged bankrupt's contention in the Circuit Court of Appeals for the Seventh Circuit, therefore, that this was a "perfunctory" order or was not based upon a full hearing before the trial court. At the close of the hearing Judge Barnes found that the court had jurisdiction of the parties and the subject matter and ordered that the restraining order entered by

Judge Igoe on February 21, 1942, restraining the prosecution of the state court proceedings, be vacated and that the alleged bankrupt be "hereby authorized to proceed in the same manner as if said (restraining) order, entered herein on February 21, 1942, had not been entered" (R. 15).

On March 31, 1942, your petitioner as appellant filed notice of appeal to the Circuit Court of Appeals for the Seventh Circuit (R. 16). Said appeal was thereafter perfected and the record on appeal filed and the case docketed in said court. On April 23, 1942, the Circuit Court of Appeals for the Seventh Circuit entered an order dismissing the appeal "for lack of jurisdiction" (R. 22). It is to review this order that this petition for certiorari is filed in this Court.

Statement of Basis of This Court's Jurisdiction.

The decision of the Circuit Court of Appeals for the Seventh Circuit in this case that it lacks jurisdiction over this appeal from an order in a bankruptcy case vacating a restraining order restraining litigation in the state court against an alleged bankrupt pending adjudication of the bankruptcy petition, under the *mandatory* provisions of Chapter III, Section 11, of the Bankruptcy Act of 1938, directly conflicts upon a question of federal law with decisions of other Circuit Courts of Appeal upon the same question.

The Questions Presented.

There are two questions presented:

1. Did the Circuit Court of Appeals for the Seventh Circuit lack jurisdiction of an appeal from an order vacating a restraining order entered in a bankruptcy case in the District Court, restraining the prosecution of litigation in the state courts against the alleged bankrupt

pending adjudication, which order vacating the restraining order was entered after a full hearing in the trial court?

2. Is the entry of a restraining order, pending adjudication of a bankruptcy petition, *mandatory* under Chapter III, Section 11, of the Bankruptcy Act of 1938?

Reasons for the Allowance of the Writ.

Under Chapter IV, Section 24, of the Bankruptcy Act of 1898, there was an appeal *as a matter of right* from the bankruptcy court to the Circuit Courts of Appeals only in the case of "controversies arising in bankruptcy proceedings." In the case of "proceedings" of the several inferior courts of bankruptcy, the several Circuit Courts of Appeals had jurisdiction, by petition for revision and not as a matter of right, "to superintend and revise in matter of law * * * the proceedings of the several inferior courts of bankruptcy within their jurisdiction."

When the Bankruptcy Act of 1898 was amended in 1938 this distinction between "controversies arising in bankruptcy proceedings," in which the appeal was a matter of right, and the jurisdiction in the several Circuit Courts of Appeals "to superintend and revise in matter of law * * * the proceedings of the several inferior courts of bankruptcy within their jurisdiction," which was had by petition for revision and not as a matter of right, was abolished.

Under Section 24 of the Bankruptcy Act of 1938, usually called the Chandler Act, a party to bankruptcy proceedings is entitled to an appeal *as a matter of right* not only in "controversies arising in bankruptcy proceedings" but also in "proceedings in bankruptcy, either interlocutory or final"; and it was specifically provided that "such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

Regardless, however, of the expansion of the right of appeal under the Chandler Act, the provisions of both the

Bankruptcy Act of 1898 and the Bankruptcy Act of 1938 specifically granted the respective Circuit Courts of Appeals "appellate jurisdiction" in bankruptcy cases, these words appearing in both Acts. The Circuit Courts of Appeals have uniformly been held by the decisions in those courts (with the single exception of the case at bar) as well as by the decisions in this Court to have jurisdiction of such appeals.

Moreover Section 129 of the Judicial Code specifically granted an appeal as a matter of right from interlocutory orders vacating or denying restraining orders; and the uniform decisions of the several Circuit Courts of Appeals and of this Court are to the effect that the several Circuit Courts of Appeals have jurisdiction of interlocutory orders vacating or denying restraining orders restraining state court proceedings under Section 129 of the Judicial Code.

It therefore amply appears that the decision of the Circuit Court of Appeals for the Seventh Circuit in this case is directly in conflict upon a question of federal law with the decisions of the other Circuit Courts of Appeals and the decisions of this Court upon the same question.

The question involved is important. Litigants should not be deprived of their rights in one of the Circuit Courts of Appeals to an appeal upon the merits of a controversy which the federal statutes and the relevant decisions of the other circuits and of the Supreme Court all uniformly grant as a matter of right.

As to the second question, i.e., whether a stay of proceedings against an alleged bankrupt in the state courts must be stayed under the mandatory provisions of Section 24 of the Bankruptcy Act of 1898 and 1938, the decisions of the Circuit Courts of Appeals have uniformly held (again with the single exception of the case at bar) that such stay orders are mandatory pending adjudication of the bankruptcy petition. The decision of Judge Barnes

vacating the restraining order entered by Judge Igoo, which was based upon the allegations of the petition to vacate unsupported by any evidence, is squarely in conflict with the mandatory provisions of the Bankruptcy Acts and with all of the other decisions of the Circuit Courts of Appeals and of this Court on this question.

Here likewise the question involved is important because it is essential to the effective operation of the Bankruptcy Acts that the assets of the alleged bankrupt shall not be subject to possible dissipation and the rights of creditors prejudiced pending adjudication and the administration of the estate in bankruptcy or the determination that no cause for bankruptcy exists. These orders restraining state court proceedings against alleged bankrupts are entered as a matter of course in practically every bankruptcy proceeding; and the mandatory provisions of the Bankruptcy Acts in this regard are essential to the rights of all parties, including the rights of both the creditors and the alleged bankrupt.

If the clear language of the Bankruptcy Acts on both these points and the numerous decisions in the other Circuit Courts of Appeals and in this Court are to be overthrown, it should only be by a square decision of this Court to that effect.

Wherefore, petitioner prays that a Writ of Certiorari be issued under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States; that said final order of said Circuit Court of Appeals be reversed or altered by this Honorable Court;

and petitioner also prays for such other, further or different relief as may seem proper.

And this petitioner will ever pray, etc.

G. F. ALBIN,
Petitioner,

By LEWIS E. PENNISH,
Counsel for Petitioner.

THOMAS S. MCCABE,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

Neither the Circuit Court of Appeals for the Seventh Circuit nor the District Court of the United States for the Northern District of Illinois, Eastern Division, rendered any opinions in this case.

Jurisdiction.

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Seventh Circuit on April 23, 1942. A Writ of Certiorari is asked under Section 240 of the Judicial Code (Act of March 3, 1911 c. 231, Section 240, 36 Stat. 1157 as amended February 13, 1925 c. 229, Section 1, 43 Stat. 938).

Statement of the Case and Questions Presented.

For a statement of the case and of the questions presented see this Petition, pages 1 to 4.

Specification of Errors.

1. The Circuit Court of Appeals for the Seventh Circuit erred in dismissing the appeal to it from the District Court of the United States for the Northern District of Illinois, Eastern Division, for lack of jurisdiction.
2. The Circuit Court of Appeals for the Seventh Circuit erred in not granting said appeal and in not taking jurisdiction thereof.
3. The Circuit Court of Appeals for the Seventh Circuit erred in not deciding said appeal upon the merits.
4. The Circuit Court of Appeals for the Seventh Circuit erred in not reversing the order vacating the restraining order entered by Judge Igoe in the trial court on February

21, 1942 and in not continuing the restraining order in full force and effect pending adjudication of the bankruptcy petition.

ARGUMENT.

That the several Circuit Courts of Appeals do have jurisdiction of appeals from orders granting or dissolving restraining orders entered in the bankruptcy court staying or restraining actions in the state court when said orders have been entered after a full hearing in the bankruptcy court is now well-settled under the provisions of the Bankruptcy Acts and under Section 129 of the Judicial Code.

I.

The several Circuit Courts of Appeals have jurisdiction of all appeals from orders, interlocutory or final, entered in the bankruptcy court.

Under Section 24 of the Bankruptcy Act of 1898 there was an appeal as a matter of right from the bankruptcy court to the Circuit Courts of Appeals only in the case of "controversies arising in bankruptcy proceedings." In the case of "proceedings" of the several inferior courts of bankruptcy the several Circuit Courts of Appeals had jurisdiction only by petition for revision, and not as a matter of right, "to superintend and revise in matter of law . . . the proceedings of the several inferior courts of bankruptcy within their jurisdiction."

When the Federal Congress passed the Bankruptcy Act of 1938 (usually called the Chandler Act) the Legislature abolished this distinction between "*controversies* arising in bankruptcy proceedings," in which the appeal was a matter of right, and "*proceedings* of the several inferior courts of bankruptcy," in which the appeal was by petition for revision and not as a matter of right.

Under Section 24 of the Bankruptcy Act of 1938 (usually called the Chandler Act), a party to bankruptcy proceedings is now entitled to an appeal as a matter of right, not only "in *controversies* arising in proceedings in bankruptcy," but also "in *proceedings* in bankruptcy, either interlocutory or final"; and it was specifically provided that "such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal." It therefore follows that the appellant on this appeal had, as a matter of right under the Chandler Act, an appeal to the Circuit Court of Appeals for the Seventh Circuit from both "*proceedings*" in bankruptcy and "*controversies*" in bankruptcy, the distinction between them having been abolished in the new Bankruptcy Act of 1938.

Moreover under the provisions of both the Bankruptcy Acts of 1898 and 1938 the several Circuit Courts of Appeals were specifically granted "appellate jurisdiction" in bankruptcy cases. These words appear in both Acts, the only difference being that under the earlier Act the appeal was not a matter of right, whereas under the Chandler Act the appeal became a matter of right. Both Sections 24 granted the several Circuit Courts of Appeals jurisdiction of such appeals. Under the Bankruptcy Act of 1898 the "jurisdiction" in proceedings in bankruptcy was "to superintend and revise in matter of law" the proceedings below; whereas under the Bankruptcy Act of 1938 the "jurisdiction" of the Circuit Courts of Appeals in proceedings in bankruptcy, either interlocutory or final is "to review, affirm, revise or reverse, both in matters of law and in matters of fact."

It is therefore clear beyond any argument that the several Circuit Courts of Appeals do have appellate jurisdiction under the provisions of Section 24 of the Bankruptcy Act and that the Circuit Court of Appeals for the Seventh

Circuit had appellate jurisdiction of this appeal. The cases are cited in the following section of this brief.

II.

The order entered March 26, 1942 in the trial court, vacating the restraining order, is an appealable order.

Although Section 24 of the Bankruptcy Act of 1938 grants to the Circuit Courts of Appeals appellate jurisdiction "in proceedings in bankruptcy, either interlocutory or final," it does not follow that all interlocutory orders are appealable. The question therefore arises as to whether the interlocutory order entered by Judge Barnes vacating the restraining order entered by Judge Igoe is such an interlocutory order as may be appealed to the Circuit Court of Appeals.

The general rule as stated by Remington on Bankruptcy, Volume 8, Section 3769, is that: "Interlocutory orders which determine nothing are not reviewable." In determining what interlocutory orders do determine something and are therefore appealable, the federal courts have uniformly construed the provisions of the Bankruptcy Act and Section 129 of the Judicial Code together; and since Section 129 of the Judicial Code specifically provides that appeals may be taken from the District Courts to the Circuit Courts of Appeals from interlocutory orders denying or vacating restraining orders, the federal courts have uniformly held that appeals are proper from orders vacating or denying restraining orders which restrain state court proceedings under both the Bankruptcy Act and Section 129 of the Judicial Code.

In *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, an order of the district court was entered staying an action at law in a chancery suit. The question was whether this interlocutory stay of an action at law was

appealable to the Circuit Court of Appeals for the Third Circuit. The Supreme Court held as stated in the syllabus that such a stay order was "in effect an injunction and, being interlocutory, is appealable to the Circuit Courts of Appeals," under the Judicial Code. Mr. Chief Justice Hughes, in his opinion, said (ps. 381-2):

"A preliminary question arises as to the jurisdiction of the Circuit Court of Appeals. The decree of the District Court was interlocutory, and the question is whether it can be considered to be one granting an injunction and thus within the purview of § 129 of the Judicial Code (28 U. S. C. 227) permitting appeal. . . . The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of § 129."

To the same effect is *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U. S. 449, from the Circuit Court of Appeals for the Second Circuit. In that case the District Court denied an application for a stay of proceedings in an action at law on a contract until an arbitration could be had in accordance with the terms of the contract. Mr. Justice Brandeis held in his opinion (p. 451-2) that this in effect was an order denying an interlocutory injunction and was therefore appealable under Section 129 of the Judicial Code of the Circuit Court of Appeals.

In the case of *General Electric Co. v. Marvel Metals Co.*, 287 U. S. 430, the Supreme Court held that an interlocutory order refusing an injunction was appealable to the Circuit Court of Appeals for the Sixth Circuit under Section 129 of the Judicial Code. This Court by Mr. Justice Butler said (p. 432-3):

"The order dismissing the counterclaim is interlocutory. (Cases cited.) The general rule is that review of interlocutory orders must await appeal from the final decree. But in proceedings for injunctions and receivers exceptions have been made by § 129, Judicial Code:

'Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals. * * * The appeal * * * must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof * * * 28 U. S. C., § 227.

The reasons suggested by plaintiffs in support of the contention that the order is not appealable are that there was no hearing upon any application for an injunction and that the dismissal of the counterclaim was not the refusal of an injunction. But by their motion to dismiss, plaintiffs themselves brought on for hearing the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction * * *. It cannot be said, indeed plaintiffs do not claim, that the dismissal did not deny to defendants the protection of the injunction prayed in their answer. The ruling of the Circuit Court of Appeals that an injunction has been denied by an interlocutory order which is review-

able under § 129 is sustained by reason and supported by the weight of judicial opinion. *Emery v. Central Trust & Safe Deposit Co.*, 204 Fed. 965, 968. *Ward Baking Co. v. Weber Bros.*, 230 Fed. 142. *Historical Pub. Co. v. Jones Bros. Pub. Co.*, 231 Fed. 638, 643. *Naivette v. Philad Co.*, 54 F. (2d) 623. Cf. *Banco Mercantil v. Taggart Coal Co.*, 276 Fed. 388, 390. Plaintiffs' motion to dismiss the appeal was rightly denied."

It will be particularly noted that Mr. Justice Butler ruled that a hearing upon a motion to dismiss a counterclaim in which an injunction was prayed was a sufficient hearing upon an application for an injunction to render the dismissal of the counterclaim the equivalent of the refusal of an injunction by an interlocutory order and therefore appealable under Section 129 of the Judicial Code. This is precisely similar to the hearing before Judge Barnes in the case at bar upon the respondent's motion to vacate the restraining order upon which the trial court rendered the order vacating the restraining order appealed to the Circuit Court of Appeals for the Seventh Circuit in this case.

All of the relevant decisions in the Circuit Court of Appeals are, so far as is known to your petitioner, in accordance with the foregoing decisions in the Supreme Court.

In *Field v. Kansas City Refining Co.*, 296 Fed. 800, an order granting the right to commence suit in a state court but enjoining and restraining such suit until further order of court was held appealable to the Circuit Court of Appeals for the Eighth Circuit under Section 129 of the Judicial Code. The appellees moved to dismiss the appeal on the ground that this order was "not an interlocutory order granting, continuing, refusing, dissolving or refusing to dissolve an injunction" within the meaning of Section 129 of the Judicial Code. Judge Kenyon of the Circuit Court of Appeals for the Eighth Circuit said in his opinion (p. 802):

"This order was an appealable one under section 129 of the Judicial Code."

In *Western Union Telegraph Co. v. U. S. & M. T. Co.*, 221 F. 545, the district court entered an order restraining the prosecution of any actions at law in a foreclosure suit. The appellee contended that such orders were mere restraining orders and therefore not appealable. The Circuit Court of Appeals for the Eighth Circuit held that they were appealable and Judge Sanborn in his opinion (p. 553) said:

"The trust company contends they are mere restraining orders, and therefore are not appealable. But the acts of Congress provide that 'when, upon a hearing in equity in a District Court, or by a judge thereof in vacation, an injunction shall be granted, denied, refused, or dissolved, by an interlocutory order or decree, or an application to dissolve an injunction shall be refused,' an appeal may be taken from the order or decree. Conceding that a restraining order granted without a hearing is not ordinarily appealable, yet a restraining order which is granted, or sustained, or denied after a hearing of the parties, and which in effect and in everything but name, is a temporary injunction, falls within the evident meaning of the statute, and is reviewable by appeal, and the orders in question were of that character. The order refusing to dissolve and modifying the restraining order was made upon a hearing upon an application of the telegraph company to dissolve it, and in the later order the former was by the court itself called 'a restraining order and injunction,' so that the second order falls, not only within the true interpretation, but within the terms of the statute, and the appeal from it invokes a review of the order of the day before which conditioned its issue. Judicial Code § 129; *Griesa v. Mutual Life Ins. Co.*, 165 Fed. 48."

In *Griesa v. Mutual Life Ins. Co.*, 165 F. 48, an interlocutory order was granted in the district court staying

further proceedings in a law action. The order, although not using the technical words "restrain and enjoin," was in purpose and effect an order granting an injunction within the meaning of the statute. The opinion by Judge Van Devanter of the Eighth Circuit Court of Appeals (pp. 49-51) said:

"The complainant then made in the suit in equity an application for 'an order staying all further proceedings' in the action at law, . . .

From this order or decree the defendants appealed, and the insurance company now moves to dismiss the appeal, claiming that such an order or decree is not appealable. . . .

As the order or decree in question was made upon a hearing in equity and was interlocutory, the decisive question is Did it grant an injunction? To us the answer does not seem doubtful. A court of equity possesses no power to stay proceedings in a court of law, save by granting an injunction against the litigant actors therein, and this is so well recognized that when, in a court of equity, a stay of proceedings in an action at law is sought or ordered, it is understood that it is this injunctive power that is invoked or exercised, although the technical terms 'restrain and enjoin' be not used. . . .

We think the order or decree granted an injunction, and is within the statute before quoted, a manifest purpose of which is to enable the defendant to seek immediate appellate relief from an injunction, the continuance of which throughout the progress of the suit in which it is granted might seriously affect his interests. *Smith v. Vulcan Iron Works*, 165 U. S. 518.

The motion to dismiss the appeal is accordingly denied."

The foregoing cases might be multiplied. They show beyond question that the Supreme Court and the Circuit Courts of Appeals have uniformly held that the Circuit

Courts of Appeals do have complete jurisdiction in equity cases over interlocutory injunction orders restraining or refusing to restrain prosecution of suits at law, regardless of whether the order is in the form of an injunction or a restraining order. These cases also show that the right of appeal specifically exists where the restraining order or injunction enjoins or restrains an action in another court.

The foregoing cases were decided under Section 129 of the Judicial Code. Where the same question as to the appealability of an order granting, continuing, refusing, dissolving or refusing to dissolve an injunction or restraining order enjoining or restraining an action in the state courts has come before the inferior courts of bankruptcy, the Circuit Courts of Appeals have likewise uniformly held that such orders are reviewable under the Bankruptcy Act and Section 129 of the Judicial Code.

In *McGonigle v. Foutch*, 51 F. (2d) 455, the bankruptcy court, under the Bankruptcy Act of 1898, restrained a proceeding in the state court. The Circuit Court of Appeals for the Eighth Circuit held that the granting of such a stay order, even though not technically a temporary injunction, was nevertheless appealable. The court said (p. 460):

"We think this order of the District Court is appealable under Section 129 of the Judicial Code.

'Conceding that a restraining order granted without a hearing is not ordinarily appealable, yet a restraining order which is granted, or sustained, or denied after a hearing of the parties, and which in effect and in everything but name, is a temporary injunction, falls within the evident meaning of the statute, and is reviewable by appeal, and the orders in question were of that character.' *Western Union Telegraph Co. v. United States & M. T. Co.* (C. C. A. 8) 221 F. 545, 553; *Field v. Kansas City Refining Co.* (C. C. A. 8) 296 F. 800."

Likewise in *Seattle Curb Exchange v. Knight*, 46 Fed. (2d) 34, the Circuit Court of Appeals for the Ninth Circuit had before it an appeal from a bankruptcy case. The court held that whereas an order directing the referee to determine the right to the proceeds of sale of the bankrupt's seat on the Curb Exchange was interlocutory and therefore not appealable, nevertheless an order affirming an injunction order of the referee, enjoining a proceeding in the state court against the trustee, was appealable. The court concluded its opinion as follows (p. 36):

"The above order of reference is no proper part of an order of injunction or of the order of affirmance thereof. Such an order of reference is interlocutory, and is not properly appealable (see *Grant v. Phoenix Mutual Life Insurance Co.*, 121 U. S. 118), while the order affirming the injunction of the referee is appealable. To avoid any inference that, by allowing the appeal from the order of May 5, 1930, we have passed upon this order of reference upon this appeal or have approved it, it will be stricken from the order appealed from, and, thus modified, the order of the District Court of May 5, 1930, affirming the injunction of the referee, is affirmed, without costs to appellant."

The foregoing *McGonigle* and *Seattle Curb Exchange* cases are both cases in bankruptcy and are therefore squarely in point to the effect that orders granting or vacating restraining orders or injunctions restraining or enjoining state court actions are appealable to the Circuit Court of Appeals. It is particularly noteworthy that in the *McGonigle* case the Circuit Court of Appeals for the Ninth Circuit relied not only on the provisions of the Bankruptcy Act permitting interlocutory appeals, but also upon Section 129 of the Judicial Code. Your petitioner knows of no authority contrary to the foregoing.

III.

It is mandatory that state court actions be stayed pending adjudication in bankruptcy under Section 11 of the Bankruptcy Act.

Section 11 of the Bankruptcy Act of 1938 is similar to the same section of the Bankruptcy Act of 1898 on the same point. The language of the latter statute is as follows:

"a. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, *shall be stayed* until an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action *may be further stayed* until the question of his discharge is determined" (Italics supplied.)

It appears from your petitioner's petition for a restraining order, and it is not denied by the respondent's petition to vacate the restraining order, that in the action before the master in chancery in the state court against the alleged bankrupt the alleged creditor of the bankrupt was claiming in excess of \$1,000 from the alleged bankrupt after all just deductions and credits claimed by the alleged bankrupt had been allowed to him (R. 8). It further appears from your petitioner's motion to dismiss the respondent's petition for an order to vacate the restraining order that said action in the state court against the alleged bankrupt is founded upon a claim from which a discharge in bankruptcy against the alleged bankrupt would be a release (R. 14). It likewise appears from the foregoing pleadings in the bankruptcy court that said action in the state court against the alleged bankrupt was pending at the time of the filing of the involuntary petition for adjudication against the alleged bankrupt (R. 10).

Regardless of the merits of the claim against the alleged bankrupt, therefore, the language of Section 11 of the Bankruptcy Act is *mandatory* and requires that said state court action "*shall be stayed* until an adjudication or a dismissal of the petition" in bankruptcy; and it is only *after* such adjudication or dismissal of the bankruptcy petition that the district court may exercise its discretion as to whether to stay such actions.

In all of the cases in which this question has been considered by the state and federal courts with which your petitioner is familiar, it has been uniformly held that upon application to the bankruptcy court for an order staying state court proceedings against the alleged bankrupt, which are founded upon claims from which a discharge would be a release and which are pending at the time of the filing of the bankrupt's petition, must mandatorily be stayed by an appropriate restraining or injunction order in the bankruptcy court.

In the case of *In re Vadner*, 259 F. 614, decided in the District Court of Nevada, the court said (p. 636):

"During the interval which elapses after petition filed and before adjudication or dismissal, *the application to stay must be granted. The language is mandatory.* After adjudication, whether a stay shall be granted is discretionary with the court." (Italics supplied.)

In the case of *In re Gerstenzang*, 52 Fed. (2d) 863, the District Court of New York said (p. 864):

"Section 11 of the Bankruptcy Act (11 U. S. C. A. § 29), makes mandatory a stay of suits on dischargeable claims *until after adjudication or dismissal of the petition*, but it is well understood that a stay of such suits *after adjudication* is discretionary." (Italics supplied.)

In the case of *In re Locker*, 30 Fed. Supp. 642, the District Court of New York said:

"It is clear that under Section 11 of the Bankruptcy Act, 11 U. S. C. A., § 29, *after there has been an adjudication of bankruptcy*, as in this case, this Court may exercise its discretion with respect to granting or refusing stays upon claims from which bankruptcy would be a discharge. See *In re Lesser*, 100 F. 433; *In re Mercedes Import Co.*, 166 F. 427; *McLeod v. Mills*, 29 Ga. App. 87, 113 S. E. 699." (Italics supplied.)

See also *Manufacturer's Finance Corp. v. Vye-Neill Co.*, 46 Fed. (2d) 146.

The supreme courts of the several states have reached similar conclusions upon the same points.

In *Star Braiding Co. v. Stienen Dyeing Co.*, 44 R. I. 8, 114 Atl. 129, the Supreme Court of Rhode Island held that Section 11 of the Bankruptcy Act of 1898, which contains the same language as to the staying of state court proceedings as the same section of the Bankruptcy Act of 1938, was mandatory in its effect and required the state court to stay the proceedings even in the absence of a stay order in the bankruptcy court. The court said (p. 129-130):

"The plaintiff seeks to support the action of said justice upon the authority of statements contained in the text of *Collier on Bankruptcy* (12th Ed.) Vol. 1, p. 291, and in certain federal cases cited by the author in his footnotes to the effect that the power of the court to stay a suit against a bankrupt is discretionary. The stay to which the author and the cases cited by him have reference is not the stay sought by this defendant on its motion, but a stay after an adjudication of bankruptcy, or one in the nature of an injunction, issued by a federal court to restrain an action

against a bankrupt in a state court, or a stay in an action begun against a bankrupt after the filing of a petition in bankruptcy against him. The power to grant such stays is discretionary. But none of them is within the provisions contained in the first part of Section 11. *Until after an adjudication or dismissal of the petition against an alleged bankrupt a suit which is founded upon a claim for which a discharge would be a release and which is pending against the alleged bankrupt at the time of filing such petition must be stayed.* Of such nature is the plaintiff's claim, and such was the condition of his suit at the time of defendant's motion for a stay. *The language of the Bankruptcy Act is peremptory.* The action should have been stayed. In Collier on Bankruptcy (12th Ed.) Vol. 1, p. 287, the author says:

'Stays of suits under the present law are, strictly speaking, confined to actions pending at the time of the bankruptcy. *They are mandatory if before the adjudication and discretionary after it.* * * * The stay of suits against the bankrupt pending the bankruptcy proceeding is *absolutely necessary* to give effect to the present bankruptcy act.' '' (Italics supplied.)

To the same effect is *Orgill Bros. v. Coleman*, 146 Miss. 217, 111 Southern 291.

We conclude, therefore, that clearly under the language of the Bankruptcy Acts of 1898 and 1938 and the Judicial Code, the Circuit Court of Appeals for the Seventh Circuit had appellate jurisdiction of the order vacating the restraining order restraining prosecution of an action in the state court and that the order of the Circuit Court of Appeals for the Seventh Circuit dismissing the appeal "for lack of jurisdiction" should be reversed. It is further clear that there is ample justification for this Court entering a final order disposing of said appeal on the ground that the restraint of the action in the state court

is mandatory under the provisions of Section 11 of the
Bankruptcy Act of 1938.

Respectfully submitted,

LEWIS E. PENNISH,
Counsel for Petitioner.

THOMAS S. McCABE,
Of Counsel.

(1173)

